TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari	1
Opinions	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	6

I

THE COURT BELOW ERRED IN SUSTAINING THE FINDING OF THE DISTRICT COURT THAT THE EXCLUSION OF TWO PROSPECTIVE JURORS FOR CAUSE, AFTER THEY EXPRESSED SOME OBJECTIONS TO THE DEATH PENALTY, INVALIDATED THE DEATH SENTENCE WHEN THE RECORD SHOWS CLEARLY THAT AT THE TIME OF TRIAL OHIO LAW CONFORMED IN ALL RESPECTS TO THE WITHERSPOON RULE AND THAT NO OBJECTION TO SUCH EXCLUSION WAS MADE DURING THE SELECTION OF THE TRIAL JURY.

Does the excusing for cause of a prospective juror constitute a violation of the Witherspoon Rule established by this Court when the statutory law of Ohio proscribes the excusing for cause of a juror in a capital case

Page

unless he has announced that he could, under no circumstances, find the accused guilty of an offense punishable by death when no objection was made to the excusing during the jury selection, and where, at the conclusion of the jury selection, defense counsel indicated complete satisfaction with the jury as selected? 6

II.

THE COURT BELOW ERRED IN SUSTAINING A FINDING OF THE DISTRICT COURT WHICH, AFTER AN EVIDENTIARY HEARING, FOUND THAT THE TRIAL COURT HAD ABUSED ITS JUDICIAL DISCRETION IN COMPELLING RESPONDENT TO STAND TRIAL IN SHACKLES WHEN THE RECORD SHOWS CONCLUSIVELY THAT THE TRIAL JUDGE IN FACT DID HAVE A SOUND BASIS FOR ORDERING THE SHACKLING.

A. Does the fact that a trial court ordered an accused to stand trial in shackles without a formal hearing constitute an abuse of discretion, and, thereby, invalidate a judgment of conviction where the record discloses that the court prior to trial had discussed the matter with trial counsel and had indicated his determination for the necessity for shackling? 12

B. May a United States District Court find that the trial court abused its discretion in ordering an accused to stand trial in shackles

Page

when the record discloses that there was ample basis for the decision made by the trial court and where the district court disregarded completely the deposition testimony of the trial judge supporting his reasons for shackling and then relied upon a fantastic theory advanced by respondent for the first time by respondent at the district court hearing to substantiate its findings that the trial judge abused his discretion? 17

III.

THE COURT BELOW ERRED IN NOT CONSIDERING THE QUESTION OF HARMLESS ERROR IN REACHING ITS FINDINGS. 24

Should the shackling of a defendant invalidate a judgment of conviction when, under the facts of the case, no other possible verdict could have been arrived at? 24

Conclusion 27

Certificate of Service 28

Appendix:

A. Opinion of The United States District Court For the Southern District of Ohio, Eastern Division 30

B. Opinion of The United States Court of Appeals for The Sixth Circuit, affirming the District Court 47

TABLE OF AUTHORITIES

Cases

	Page
Allied Mutual Insurance Company v. Robertson, 220 F. Supp. 25 (E.D. S.C. 1963)	7
Benjamin v. Lawson, 83 Ohio App. 189 (1947)	11
Blaine v. United States, 136 F. 2d 284 (D.C. C.A. 1943)	14
Boulden v. Holman, 394 U. S. 478 (1969)	8
Buder v. Bell, 306 F. 2d 71 (6th Cir. 1962)	13
Bussey v. Maxwell, 362 F. 2d 973 (6th Cir. 1966)	8
Chapman v. California, 386 U. S. 18 (1966)	26
Gemmel v. Buchkoe, 358 F. 2d 338 (6th Cir. 1966)	13
Gray v. Johnson, 354 F. 2d 986 (6th Cir. 1965)	20
Gregory v. United States, 365 F. 2d 203 (8th Cir. 1966)	14
Illinois v. Allen, 25 L. Ed. 2d 353 (1970)	14
Jones v. Russell, 396 F. 2d 797 (6th Cir. 1968)	20
Kimbro v. Bomar, 333 F. 2d 755 (6th Cir. 1964)	8

Page

Needle v. Scafati,
412 F. 2d 761 (1st Cir. 1969) 23

O'Connor v. Ohio,
385 U. S. 92 (1966) 11

Odell v. Hudspeth,
189 F. 2d 300, 302 (10th Cir. 1951) 13, 14, 25

Patterson v. Hampton,
355 F. 2d 470 (10th Cir. 1966) 8

Rhay v. Browder,
342 F. 2d 345 (9th Cir. 1965) 13

Rose v. Dickson,
327 F. 2d 27 (9th Cir. 1964) 8

Samuel v. United States,
U.S. C.A. (4th Cir. 1970) 14, 17

Schmerber v. California,
384 U. S. 757, 765 (1966) 11

Smart v. Balkcom,
352 F. 2d 502 (5th Cir. 1965) 8

State v. Eaton,
19 Ohio St. 2d 145 10

State v. Pruett,
18 Ohio St. 2d 167 (1969) 11

State v. Woodards,
6 Ohio St. 2d 14 (1966) 4, 6, 13

Townsend v. Sain,
372 U. S. 293, 318 (1963) 8

United States ex rel. Bruno v. Herold,
408 F. 2d 125, 129 (2nd Cir. 1969) 23

Page

United States ex rel. Krzywosz v. Wilkins,
336 F. 2d 509 (2nd Cir. 1964) 8

United States for the Use of Atkins v. Reiten,
313 F. 2d 673 (9th Cir. 1963) 7

Walker v. Maxwell,
1 Ohio St. 2d 136 8

Witherspoon v. Illinois,
391 U. S. 510 (1968) 7

Woodards v. Ohio,
305 U. S. 930 (1966) 13

CONSTITUTION

Constitution of the United States:

Amendment VI 3

Amendment XIV, Section 1 3

STATUTES

Section 2945.25 (C), Ohio Revised Code 9

Section 2953.02, Ohio Revised Code 7, 8

Section 2953.04, Ohio Revised Code 7

Section 2953.05, Ohio Revised Code 8

Section 2953.21, Ohio Revised Code 8

Section 2953.21-24, Ohio Revised Code 7

MISCELLANEOUS

	Page
Rule 15 (d) Federal Rules of Civil Procedure	7
Rule 19 (b) Supreme Court Rules	2
Title 28, U.S.C., Section 1254(1)	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ——

H. J. CARDWELL, Warden
Ohio Penitentiary,

Petitioner,

vs.

JOHN ELMER WOODARDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

To The Honorable, the Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, H. J. Cardwell, prays that a Writ of Certiorari issue to review the judgment and final order of the United States Court of Appeals for the Sixth Circuit, made herein on August 17, 1970, which judgment affirmed the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, granting respondent's petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the District Court is attached hereto in the Appendix, *infra*, at page 30. The Court of Appeals' opinion is likewise attached hereto, *infra*, at page 47.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 17, 1970. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1); and, pursuant to Rule 19(b) of the Supreme Court Rules, petitioner believes that the decision of the Court of Appeals is in conflict with the decisions of both this Court and other Courts of Appeals.

QUESTIONS PRESENTED

1. The excusing for cause of a prospective juror does not constitute a violation of the Witherspoon Rule established by this Court when the statutory law of Ohio proscribes the excusing for cause of a juror in a capital case unless he has announced that he could, under no circumstances, find the accused guilty of an offense punishable by death when no objection was made to the excusing during the jury selection, and where, at the conclusion of the jury selection, defense counsel indicated complete satisfaction with the jury as selected.

2. The fact that a trial court ordered an accused to stand trial in shackles without a formal hearing did not constitute an abuse of discretion and thereby invalidate a judgment of conviction where the record discloses that the court, prior to trial, had discussed the matter with trial counsel and had indicated his determination for the necessity of shackling.

3. A United States District Court may not find that the trial court abused its discretion in ordering an accused to stand trial in shackles when the record discloses that there was ample basis for the deci-

sion made by the trial court, where the District Court disregarded completely the deposition testimony of the trial judge supporting his reasons for shackling, and then relied upon a fantastic theory advanced for the first time by respondent at the district court hearing to substantiate its findings that the trial judge abused his discretion.

4. Should the shackling of a defendant invalidate a judgment of conviction when, under the facts of the case, no other possible verdict could have been arrived at.

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The record discloses that respondent, John Elmer Woodards, was indicted for first degree murder on July 23, 1963, and at the arraignment on July 26, 1963, while represented by counsel, pleaded not guilty. Subsequently, the additional plea of not guilty by reason of insanity was entered. As a result of this additional plea respondent underwent psychiatric examination both at the Lima State Hospital and by private psychiatrists.

The undisputed findings in this case are as follows:

On Saturday, July 13, 1963, Margaret Van Arsdale, a woman 85 years of age, was discovered dead in a utility room at her home in Columbia Station, Ohio (a small community just west of Cleveland, Ohio). A blanket was wrapped around her body and tied with her nightclothes and underclothes.

An autopsy showed that all her ribs had been broken, her spleen ruptured and her perineum and vaginal wall torn. She had suffered injuries to her head, left forearm, right hand and other parts of her body.

In the trial before a jury, Woodards testified in his own behalf as to his version of the events which took place on the night of July 12, 1963. This varied with the testimony of state's witnesses but did place him at the scene of the crime and proved his participation in the events which caused the death of the victim.

The jury convicted appellee of murder in the first degree, without a recommendation of mercy, and the mandatory death sentence was imposed. After appellate affirmance of this conviction in the Ohio courts, *State v. Woodards*, 6 Ohio St. 2d 14 (1966), an action for a writ of habeas corpus was filed in the United States District Court for the Southern District of Ohio, Eastern Division, and the petitioner was granted an indefinite stay of execution of his death sentence by that court on December

23, 1966, pending the outcome on the merits of this action.

At the trial prospective jurors were excused for cause by the trial court when they evidenced their objection to capital punishment. Only two of these were excused before they had indicated that under no circumstances could they impose the death penalty. The court also ruled that appellee should stand trial in shackles after a request by defense counsel to remove same.

The trial record shows that the trial court did summarily order the respondent to stand trial in shackles.

It might appear that in making this determination the trial court surrendered its discretionary powers to a deputy sheriff. But in a deposition taken from the trial judge prior to the evidentiary hearing in the district court it is amply clear that the question of shackling was discussed at pre-trial conferences, that the trial judge was informed of an attempted jail break (A. 126, 130-31, 135-136), that appellee had pleaded not guilty by reason of insanity (A. 125), that he was aware of the psychiatric findings from Lima and of private psychiatrists (A. 127), that even defense counsel had evidenced apprehension about respondent's security in pre-trial proceedings (A. 136), and that before trial, based upon information before him, he already had made up his mind that appellee would be shackled during the trial (A. 135-139). It is acknowledged that the trial court did not conduct either a formal or informal recorded hearing on the question of shackling (A. 143). It is notable that in eighteen and a half years on the bench only one other prisoner had been tried in shackles before this judge (A. 144).

There is nothing in the record, nor in fact in any pleadings, to indicate that any attempt was made on the part of defense counsel to suggest any other security measures which might have been taken other than shackling.

The record further discloses that only one prospective juror was excused without thorough questioning as to whether, under any circumstances, he could not find a verdict of guilt in a capital case. Further that the prosecution used none of its six pre-emptory challenges.

In his appeal to the Supreme Court of Ohio respondent did not raise the question of the exclusion of the two prospective jurors complained of in his amended petition in the United States District Court. He did, however, raise the question of shackling which was decided against him. *State v. Woodards, supra.*

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED IN SUSTAINING THE FINDING OF THE DISTRICT COURT THAT THE EXCLUSION OF TWO PROSPECTIVE JURORS FOR CAUSE, AFTER THEY EXPRESSED SOME OBJECTIONS TO THE DEATH PENALTY, INVALIDATED THE DEATH SENTENCE WHEN THE RECORD SHOWS CLEARLY THAT AT THE TIME OF TRIAL OHIO LAW CONFORMED IN ALL RESPECTS TO THE WITHERSPOON RULE AND THAT NO OBJECTION TO SUCH EXCLUSION WAS MADE DURING THE SELECTION OF THE TRIAL JURY.

Does the excusing for cause of a prospective juror constitute a violation of the Witherspoon Rule established by this Court when the statutory law of Ohio proscribes the excusing for cause of a juror in a capital case unless he has announced that he could, under no circumstances, find the accused guilty of an offense punishable by death when no objection was made to the excusing dur-

ing the jury selection, and where, at the conclusion of the jury selection, defense counsel indicated complete satisfaction with the jury as selected?

The shackling issue first was presented to the District Court in an amended petition despite the provisions of Rule 15(d), Federal Rules of Civil Procedure, which allows the introduction of a cause of action not in existence when the original complaint was filed.[1]

Before the case came on for hearing this Court decided the case of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In *Witherspoon* this Court stated at page 521:

> "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen *for cause* simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Emphasis added)

After this decision respondent submitted still another motion to file a supplemental amended petition setting forth, among many additional issues, the *Witherspoon* issue. Petitioner vigorously opposed this motion for the reason that none of the new issues submitted to the court had at any time been submitted to the Ohio Courts, and that the remedies both of delayed appeal under the provisions of Sections 2953.02 and 2953.04, Ohio Revised Code, and collateral attack under the provisions of Sections 2953.21-24, Ohio Revised Code, were available to respondent to enable him to raise these issues. A motion

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1. *United States for the Use of Atkins v. Reiten*, 313 F. 2d 673 (9th Cir. 1963); *Allied Mutual Insurance Co. v. Robertson*, 220 F. Supp. 25 (E.D. S.C. 1963).

to dismiss these issues was filed by petitioner but denied by the District Court.

If there was, in fact, a *Witherspoon* violation in respondent's trial, then the remedy of delayed appeal under the provisions of Sections 2953.02 and 2953.05, Ohio Revised Code, was available to attack the death sentence, which, under the *Witherspoon* doctrine, would be constitutionally unsound.[2]

Further, since defense counsel could not have been aware of *Witherspoon* at the time of trial, and, therefore, could not have raised the question on that basis either at trial or on appeal, petitioner still had the remedy of collateral attack under the provisions of Section 2953.21, Ohio Revised Code.

The general rule following the doctrine of *Townsend v. Sain*, 372 U.S. 293, 318 (1963) generally has been that when a question has not been presented to the State courts and a remedy is available to raise it therein that federal habeas corpus will not lie to review it.[3]

In *Boulden v. Holman*, 394 U.S. 478 (1969) this Court decided another case involving the *Witherspoon* doctrine. In that case, originating in Alabama, it was noted that the Alabama criteria like that of Illinois, for excluding potential jurors because they had a fixed opinion against capital punishment, was constitutionally unsound. While holding that the sentence of death could not stand, this Court nevertheless noted that it was not clear whether petitioner had exhausted his state remedies and remanded the case to the State for further consideration.

The decision of the district court as sustained by the court of appeals regarding this issue demonstrates why

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2. *Walker v. Maxwell*, 1 Ohio St. 2d 136.

3. *Kimbro v. Bomar*, 333 F. 2d 755 (6th Cir. 1964); *Bussey v. Maxwell*, 362 F. 2d 973 (6th Cir. 1966); *Rose v. Dickson*, 327 F. 2d 27 (9th Cir. 1964); *Patterson v. Hampton*, 355 F. 2d 470 (10th Cir. 1966); *Smart v. Balkcom*, 352 F. 2d 502 (5th Cir. 1965); *United States ex rel Krzywosz v. Wilkins*, 336 F. 2d 509 (2nd Cir. 1964).

a state should be allowed to decide issues prior to their being decided in federal courts. Here the district court failed to consider the impact of *Witherspoon* which was based upon the wholesale dismissal for cause from a jury panel of all prospective jurors who had evidenced an objection to the death penalty without more. It failed also to consider that if, with respect to two prospective jurors, the trial court committed error, it amounted to harmless error in that the prosecution had exercised none of its six preemptory challenges. Moreover, the State of Ohio, by law, has provided that a juror may be excused for cause in a trial of a capital offense if his opinions preclude him from finding the accused guilty of an offense punishable by death.[4] This statute does not conflict with *Witherspoon* which held that the Illinois statute was constitutionally unsound for the reason that it allowed the challenge for cause of any juror who had professed that he "has conscientious scruples against capital punishment, or that he is opposed to the same."

Under the facts of this case it is clear that the trial court was aware of the Ohio law. Twenty-four prospective jurors were questioned before the jury finally was accepted. Seven of these were excused after they had averred that under no circumstances could they pronounce a death sentence.

Only with respect to Robert A. Cobbs and Gilbert A. Fairchild did the district court find fault with the procedures surrounding their excuse for cause. A reading of the complete testimony of Robert A. Cobbs with respect to the question of capital punishment discloses that it was dubious, to say the least, that he did not disqualify himself within the meaning of the law.

It is only in the case of prospective juror Gilbert A. Fairchild that the trial court appears not to have inquired

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4: Section 2945.25(C), Ohio Revised Code.

as deeply as Ohio law requires but also it is clear that the juror himself had raised the question and further questioning would have produced no different result. The fact that the district court found no other objectionable dismissals for cause is an indication that the trial court was attempting to do its proper duty. It further is significant that no objection was made at the time by defense counsel when under Ohio law they could have objected had they seen fit and that ultimately they indicated their complete satisfaction with the jury as settled upon and sworn (A. 79).

Significantly, the defense exercised five pre-emptory challenges. The prosecution exercised none. Had there been any question in the minds of the prosecution concerning prospective jurors Cobbs and Fairchild, they could have been challenged pre-emptorily. In Ohio a defendant in a criminal case cannot complain of prejudicial error in the overruling of a challenge for cause if it does not force him to exhaust his pre-emptory challenges. *State v. Eaton*, 19 Ohio St. 2d 145. Conversely, he should not be allowed to complain of the dismissal of a prospective juror for cause where the prosecutor has unused pre-emptory challenges. Respondent, therefore, could not have been harmed by the dismissal of the two jurors which, if erroneous, at most constituted harmless error.

The district court's finding that by the dismissal of two jurors for cause without a compliance of the *Witherspoon* rule fails completely to consider the questions of waiver. The law in Ohio, which has been in effect since at least 1869, provides that a prospective juror could not be challenged for cause for his opinions concerning capital punishment unless they would preclude him from finding the accused guilty of an offense punishable by death. The Supreme Court of Ohio specifically has held

that this safeguard is identical to that provided in *Witherspoon*, and, therefore, has been compatible with the due process of law requirement as interpreted by this Court.[5]

There is no known law in Ohio which would indicate any modification of the language of the statute or the application of a less stringent standard. Under Ohio law any error in the examination of tentative jurors by the trial court as to their qualifications will be waived in the absence of timely objection.[6]

It is recognized by petitioner that when constitutional rights are involved, a defendant normally has been held not to be precluded from a subsequent reliance on a previously waived right if the right in question was established after final determination of his case in the State courts and the written law of the State previously had negated the existence of such a right.[7] But *Witherspoon* rights do not involve this exception. As indicated, the statutory law of Ohio long has been compatible with the *Witherspoon* standards and respondent's failure properly to raise the question at the time of trial when it was open to him should preclude his reliance upon it now.[8, 9]

Petitioner, while not admitting that the methods of selecting the jury were improper or unconstitutional in this case, believes that respondent who sat idly by at trial, did not object to the excusing of any prospective juror for cause and finally accepted the jury chosen without exception, cannot now claim lack of due process.

The appellate court did not consider the question of waiver.

5. *State v. Pruett*, 18 Ohio St. 2d 167 (1969).
6. *Benjamin v. Lawson*, 83 Ohio App. 159 (1947).
7. *O'Connor v. Ohio*, 385 U. S. 92 (1966).
8. *State v. Pruett*, *supra*.
9. *Schmerber v. California*, 384 U. S. 757, 765 (1966).

ISSUE II

II. THE COURT BELOW ERRED IN SUSTAINING A FINDING OF THE DISTRICT COURT WHICH, AFTER AN EVIDENTIARY HEARING, FOUND THAT THE TRIAL COURT HAD ABUSED ITS JUDICIAL DISCRETION IN COMPELLING RESPONDENT TO STAND TRIAL IN SHACKLES WHEN THE RECORD SHOWS CONCLUSIVELY THAT THE TRIAL JUDGE IN FACT DID HAVE A SOUND BASIS FOR ORDERING THE SHACKLING.

A. Does the fact that a trial court ordered an accused to stand trial in shackles without a formal hearing constitute an abuse of discretion, and, thereby, invalidate a judgment of conviction where the record discloses that the court prior to trial had discussed the matter with trial counsel and had indicated his determination for the necessity for shackling?

The District Court apparently did not believe that the question of shackling could be decided upon the record and ordered an evidentiary hearing. Rather than take the trial judge away from his duties the parties hereto stipulated, with the consent of the district court, that his deposition be taken. This deposition then was taken on February 7, 1969, and was stipulated in evidence at the district court hearing (A. 170).

It is conceded by petitioner that no recorded formal or informal hearing was conducted prior to trial to determine whether it was necessary to maintain respondent in a shacked condition throughout the trial in order to insure security. But contrary to the ruling of the district court petitioner maintains that such a hearing is

not necessary to enable a trial court to exercise a discretionary function.

The trial court record itself does, at the outset of the trial, disclose that Mr. Lon Adams, one of respondent's counsel, requested that the shackles be removed during the trial and that his request was denied with exception recorded (A. 85). This obviously was done to preserve the objection.

One of the assignments of error on the appeal concerned the shackling. The Supreme Court of Ohio in reviewing this question found that the record disclosed valid reasons for refusing to unshackle respondent during the trial. It cited an attempted jail break and the fact that respondent had pleaded guilty by reason of insanity as evidence that the trial judge had not abused his authority.[10]

It is notable that the right to trial in an unshackled state is not a constitutional one. It is, however, one that does go to the fairness of the trial and may be reviewed on appeal. This Court apparently found no constitutional infirmity in the conviction when it denied certiorari.[11]

In deciding the shackling issue in favor of appellee the district court set itself up as an appellate court and established its own criteria for the proper exercise of a discretionary act. This is not a proper function of federal habeas corpus.[12]

In its opinion the district court cited an excerpt from *Odell v. Hudspeth*, 189 F. 2d 300, 302 (10th Cir. 1951). It stopped short, however, of a significant part of that decision which stated:

10. *State v. Woodards*, supra.
11. *Woodards v. Ohio*, 385 U. S. 930 (1966).
12. *Buder v. Bell*, 306 F. 2d 71 (6th Cir. 1962); *Gemmel v. Buchkoe*, 358 F. 2d 338 (6th Cir. 1966); *Rhay v. Browder*, 342 F. 2d 345 (9th Cir. 1965).

". . . The question of whether the manacling was an abuse of discretion should have been tested on appeal. Federal courts interfere with the administration of justice in state courts only in rare cases where circumstances of peculiar urgency are shown to exist. Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L. Ed. 398; Ex Parts Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L. Ed. 572; Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805, 43 L. Ed. 91; Kohl v. Lehlback, 160 U.S. 293, 16 S.Ct. 304, 40 L. Ed. 432; In re Wood, 140 U.S. 278, 11 S.Ct. 738, 35 L. Ed. 505; Cook v. Hart, 146 U.S. 183, 13 S.Ct. 40, 36 L. Ed. 934; McElvaine v. Brush, 142 U.S. 155, 12 S.Ct. 156, 35 L.Ed. 971; Schechtman v. Foster, 2 Cir., 172 F. 2d 339, certiorari denied, 339 U.S. 924, 70 S.Ct. 613. *We do not say that a remedy is not available in federal courts where it is clear that the trial in a criminal case was a farce, dominated by a mob, or the conduct of the citizens of the community and its officers prevented a fair and impartial trial such as in the case of Moore v. Dempsey, supra,* or a situation recited by Mr. Justice Jackson in Shephard v. Florida, 71 S.Ct. 549. We have no such case there." Odell v. Hudspeth, supra, at 302. (Emphasis added) [13].

It is apparent that in arriving at these findings the district court ignored completely the deposition of Judge Pincura and pertinent testimony of Mr. Lon B. Adams, trial defense counsel, and Mr. John Otero, one of the trial prosecutors.

In a recent case, *Samuel v. United States,* U.S. Court of Appeals (4th Cir. decided September 14, 1970), wherein the facts herein are not unlike those in the present case, the court stated in applying the rule of this Court in *Illinois v. Allen,* 25 L. Ed. 2d 353 1970:

". . . The judge presiding at the trial, the jurors, courtroom personnel and spectators are entitled to security

13. See also *Blaine v. United States,* 136 F. 2d 284 (D.C. C.A. 1943); *Gregory v. United States,* 365 F. 2d 203 (8th Cir. 1966).

in the performance of their functions or in observing the trial. The members of the public out of the courtroom are entitled to security in the pursuit of their daily activities. The public also has an interest in the expeditious trial of persons accused of crime, and an interest in preventing the guilty from being at large and committing other offenses. Thus, in appropriate circumstances, the accused's right to the indicia of innocence before the jury must bow to the competing rights of participants in the courtroom and society at large."

The court then continued:

"The cases traditionally state that accommodation between these conflicting interests lies within the discretion of the district judge. It is he who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes. * * * As a discretionary matter, the district judge's decision with regard to measure for security is subject to limited review to determine if it was abused. We stress that the discretion is that of the district judge. He may not, as is suggested at one part in the record before us, delegate that discretion to the Marshal. Of course, he should consult with the Marshal when other than ordinary security such as the general presence of guards in the courtroom is contemplated, and he may rely heavily on the Marshal's advice as to what may be required since it is the Marshal who has the experience in the keeping of prisoners and who must provide the guards and bear the major responsibility if untoward incidents occur.

"Unless the district judge's discretion is to be absolute and beyond review, the reasons for its exercise so as to require special security measures, must be disclosed in order that a reviewing court may determine if there was an abuse of discretion. Cf. United States v. Broyles, 7 CrL 2068 (4 Cir. 1970). Whenever un-

usual visible security measures in jury cases are to be employed, we will require the district judge to state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportunity to comment thereon, as well as to persuade him that such measures are unnecessary. * * * We will not require the formal taking of evidence on the subject in the usual case, but a district judge may conclude to take evidence and make findings if the factual need for extraordinary security is controverted. This requirement will apply to all criminal jury cases, the trial of which begin after the date of the filing of this opinion."

The court then found that the record before it was such that it could not be said that there was no abuse of discretion on the part of the district judge in requiring the defendant to stand trial in handcuffs. After determining that the rule established by the court was prospective only, the court then decided to postpone the ultimate decision on the question at issue and directed the district judge to supplement the record with a succinct statement of all of the reasons, facts, and matters from which he concluded that it was necessary to require the defendant to be tried before a jury while shackled upon the receipt of which a final decision would be made. It is significant that this decision is one wherein a federal appellate court is reviewing a judgment of conviction on appeal from a federal district court which is immediately answerable to it. In the case at bar the judgment of the trial court in exercising its discretion already has been affirmed by the appellate court and the Supreme Court of Ohio, yet the federal district court has seen fit to substitute its judgment not only for that of the trial judge, but also for that of the court of appeals and the Supreme Court of Ohio. This might have been appropriate had there been no indication in the record

that the trial court had reasons for ordering the shackling of the respondent. Such was not the case. A remand under the realistic and practical decision in *Samuel v. United States, supra,* rather than the vacation of the judgment of conviction could have provided the district court a basis upon which to have reached a final determination of the question and at the same time would have enhanced the doctrine of comity that this Court universally has advocated.

B. May a United States District Court find that the trial court abused its discretion in ordering an accused to stand trial in shackles when the record discloses that there was ample basis for the decision made by the trial court and where the district court disregarded completely the deposition testimony of the trial judge supporting his reasons for shackling and then relied upon a fantastic theory advanced by respondent for the first time by respondent at the district court hearing to substantiate its findings that the trial judge abused his discretion?

In order to support the substitution of its judgment as to the necessity of shackling for that of the trial judge, the district court proceeded to make six findings of fact. In arriving at these findings it is apparent that the district court then ignored completely the deposition of Judge Pincura, the trial judge, and pertinent testimony of Mr. Lon B. Adams, a trial defense counsel, and Mr. John B. Otero, one of the trial prosecutors. In order to dispel the argument that the trial court had known of an attempted jail break, the district court found that respondent used certain contraband articles discovered

in his cell to make innocent articles not to effect an escape, although his testimony at the district court hearing refuted completely his trial testimony. That the tools in question were found in respondent's cell is undisputed. At the district court hearing he contended that they were used in making harmless souvenir articles. This the district court chose to believe. It is noteworthy that when the discussion of their findings and their alleged use for attempted escape purposes was made at the pre-trial hearings no effort then was indicated to explain an innocent use. Further it is significant that had he been using the articles for an innocent purpose, why should he have concealed them?

At his trial respondent testified in substance that he had found the articles in question in holes in the wall approximately an inch in diameter below the steel window frame. That he had no plan for using these things but that he didn't know how to get rid of them. That he never used them in any way. He knew them to be contraband. This testimony is as follows:

"Q. Yes, tell me what they were.

"A. There was a hacksaw blade approximately one inch long and there was a heel c[illegible]t from my shoe. There was a $5 bill and there w[illegible] a little piece of metal about that long (indicating).

"Q. Now, where did you find the piece of the file?

"A. I had—

"Q. Where did you get it?

"A. I had gotten it out from the window sill.

"Q. Did you find it or what?

"A. Oh, yes. If I can explain?

"Below the window, they have holes. It's a steel window frame. It has holes approximately one inch in diameter (indicating), and they have wooden pegs that they drove in there to seal off the cold air, I

imagine, in the wintertime. That's used for ventilation in the summer.

"Well, they had been driven back into the window sill, out of the holes, and it was cold in there and I was trying to—I had a pencil. I was trying to fish them out so I could stick them back in the hole and then I come up with these articles.

"Q. Well, how many of these things did you find in there?

"A. I found—oh, that hacksaw blade, approximately that long (indicating), one inch; and there was a little piece of metal and a needle, I think it was.

"Q. Was there a key?

"A. Yes, sir, but I didn't get the key there.

"Q. Where did you get the key?

"A. I got the key in Lima.

"Q. Did you have any plan for using these things or anything of that kind?

"A. No, sir.

"Q. Why did you keep them?

"A. I don't know. I didn't know how to get rid of them, I guess—just kept them.

"Q. Did you ever try to use them in any way?

"A. No, I didn't." (Trial Transcript 885, 886)

Then some five years later he testified in detail how he had procured these articles, that he had used them to make picture frames, etc., out of paper and how he had disposed of the manufactured articles. The holes under the window now had grown in size to 1½ to 2 inches in diameter and still they were not large enough to enable him to push exhibit 2B through the fourteen or fifteen inch thick wall without bending it. Then it was pushed through with two pencils tied together. (A. 167b). [After this length of time all of the items presented in court still appear to be new and there is no physical indication that exhibit 2B ever was bent. Counsel for petitioner was unable to bend it with utmost pressure of the hands.]

Petitioner believes that counsel as competent as trial counsel of respondent, aware of the damaging effect of the finding of the contraband articles in his cell, would have cleared up the manner of their use at that time if in fact they had been used for the purpose now claimed. Respondent had to have been aware of this at the time yet he made no effort to explain at his trial an innocent use. Instead, he denied their use for any purpose. This subsequent explanation hardly fulfills the burden of proof that falls upon him in a habeas corpus action. *Gray v. Johnson*, 354 F. 2d 986 (6th Cir. 1965); *Jones v. Russell*, 396 F. 2d 797 (6th Cir. 1968).

The district court finding completely ignores the deposition of Judge Pincura wherein it was made abundantly clear that before trial, after pre-trial conferences, he definitely had made up his mind that respondent would be shackled during the trial. (A. 135-138). This decision was based upon facts known to him before trial. He specifically notes that he considered the fact that appellee had entered a plea of not guilty by reason of insanity; that he had considered both the psychiatric reports (the Lima State Hospital and the report of Dr. Friedman); that he had had information of an attempted jail break and that in some pre-trial hearings counsel had agreed that appellee should be shackled. Specifically Judge Pincura's testimony with respect to this question is as follows:

> "A. I had already made my mind up that he was going to be because I considered him to be a security risk and I responded to Adams that it was up to the Sheriff.
>
> "In other words, if the Sheriff had made some response and recommendation to me that his security was not in so-called jeopardy and the Sheriff would have assured me that no such element was involved, I probably would have gone along and changed my

mind, but I had made my mind up he was going to be handcuffed because of security reasons.

"Q. Judge, had you made up your mind on the basis of the reports you had received from the deputies?

"A. Yes, sir.

"Q. On the basis of anything else?

"A. And on the basis that even his own counsel, who was here, perhaps felt that his handcuffs—before trial, that his handcuffs shouldn't be removed, plus the psychiatric reports.

"Q. Judge, did counsel ever say that the handcuffs should not be removed?

"A. Yes, in a pre-trial session.

"Q. He said that, in his opinion, in the interest of security, the handcuffs should not be removed?

"A. He did not use that language.

"Q. Did he say at that point at the pre-trial conference he had no objection to the handcuffs being on?

"A. I don't know what words he used, but I know that my conclusion was that even his counsel was apprehensive about his security before trial.

"Q. Well, at the time of the trial, then, did you consider his counsel's request for removal of the shackles as an indication that he was no longer apprehensive?

"A. Well, there wasn't anything presented to me to dispel the apprehension that I had.

"Q. Well, the apprehension that you had, Judge, was based upon information disclosed to you by the Sheriff and the deputies and also information contained in the Lima reports, is that correct?

"A. That is correct." (A. 135-137)

That such pre-trial discussions concerning the attempted jail break had taken place is evidenced by the testimony of Mr. Adams at pages A. 171 b-c that on the morning of the trial and prior to his formal motion the judge made known to defense counsel that appellee was to stand trial in shackles and his reasons therefor (A. 171d-172) as follows:

"Q. You knew he had made up his mind?
"A. That's right.
"Q. Did he ever tell you what facts he had relied upon in making up his mind?
"A. I think he did.
"Q. When was that?
"A. I can't tell you exactly, but it was after the trial, after Mr. Woodards was first brought into the courtroom at the start of the trial.
"Q. And what was said?
"A. I think he said that something to the effect that they had found these items in Mr. Woodards' possession and that we raised the question of defense by reason of insanity and he felt that under those circumstances he wasn't going to take the shackles off unless the Sheriff approved of it."

The testimony of John B. Otero likewise confirms a considerable hearing both in the courtroom and in the judge's chambers on the morning of the trial and before the jury panel entered the courtroom. (H.R. 165-167).

It is significant that all attorney witnesses commented that it was not normal for Judge Pincura to cause a defendant to stand trial in shackles and Mr. Adams noted that whereas prior to the *Escobedo* case pre-trial conferences normally were not recorded, since that time they have been. (H.R. 159).

In summary, an impartial review of the trial record, the deposition of Judge Pincura and the transcript of the hearing below leads one to believe that the trial court was in a position to decide, at the time of the trial, whether shackles should be ordered and based upon the facts known to it at that time, ordered that the shackling was necessary; that ample discussion of the questions was had by all concerned to settle the issue; that in Ohio no recorded adversary hearing was required

to determine the issue; and that the discretionary decision was that of the trial court not that of the sheriff.

This determination should not be overridden by another court, acting as an appellate body, which of necessity had to make its determination on claims which were unknown to the trial court, some of them impossible of belief, and with complete disregard of the deposition of that trial court. That decision was clearly erroneous and should have been overruled. In resolving a recent federal-state conflict case wherein the district court had granted a writ of habeas corpus, the appellate court held:

> "The district court erred, not in holding an evidentiary hearing, but in granting the writ when it was able to appraise the relevance and weight of evidence which petitioner had been able to but did not present to the state court." [14]

The United States Court of Appeals, Second Circuit, in reversing the district court's ruling that the defendant was denied his constitutional right to a public trial by the temporary removal of the public while a witness testified, stated:

> "Absent quite extraordinary circumstances, the trial counsel and the trial judge then on the scene should be presumed to be the best qualified to appraise the situation requiring trial rulings. Federal judges sitting in habeas corpus should be most reluctant to retry the case from the vantage point of their reflective wisdom." [15] Nor should the trial court have done so here.

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14. *Needle v. Scafati*, 412 F. 2d 761 (1st Cir. 1969).

15. *United States ex rel. Bruno v. Herold*, 408 F. 2d 125, 129 (2nd Cir. 1969).

ISSUE III

III. THE COURT BELOW ERRED IN NOT CONSIDERING THE QUESTION OF HARMLESS ERROR IN REACHING ITS FINDINGS.

> Should the shackling of a defendant invalidate a judgment of conviction when, under the facts of the case, no other possible verdict could have been arrived at?

Respondent, by his own testimony in the trial of his cause, placed himself at the scene of the crime and attempted to explain away any guilt intent upon his part. In explanation for his presence there he described a pattern of conduct wherein he frequently had visited the victim for the purpose of having illicit sexual relations, acts of which she had been a willing participant. This is evidenced by the following statement of trial counsel:

> "MR. ADAMS: For the purposes of the record, I would like to proffer the answer, that if the defendant was permitted to answer that question, he would testify that he had relations with Mrs. Van Arsdale in her home with her consent and at her request on at least three occasions between January 1, 1963 and July 12, 1963." (Trial Transcript 842)

The trial record then between pages 842 and 849 describes dates and circumstances upon which these acts took place. Respondent contended that the victim's death was caused by a single fall when a table upon which he and the victim were having sexual intercourse tipped over and he fell upon her.

This contention was confirmed by the testimony of Dr. Wilfred M. Gill who stated that respondent, in his psychiatric examination, had confirmed to him that the fatal occasion was the fourth time that he had inter-

course with the victim (Trial Transcript 899). The testimony of defense witness Dr. Maurice Friedman substantiates such a contention. (Trial Transcript 700).

The testimony of states witness Robert Thomas, M.D., at pages 136 to 261 of the trial transcript, describes in detail every finding of injury disclosed by the autopsy on the victim. On examination the doctor indicated in answer to the question, "Do you have an opinion whether or not such injuries, as you have testified to, could have been caused by one fall?", "I feel it could not." (A. 96). This opinion was iterated at A. 97-98. Then on cross-examination at pages 243 to 248 of the trial transcript, Dr. Thomas indicated the atrophied genital organs of the victim were such that she could not have had sexual intercourse with anyone, and that they were torn as a result of some object, which could have been a male penis being forced into them. (Trial Transcript 246-247, 259).

Coupled with the testimony of the police officers to whom respondent had admitted the crime, the impossibility of believing his story could leave the jury only one conclusion, namely, that respondent had committed the offense as alleged.

The shackling of respondent therefore could have had no effect upon the verdict of the jury. Under the facts of this case, as were presented to the jury for its consideration, it is inconceivable that any other verdict was possible. It therefore is difficult to ascertain in what manner respondent was denied a fair trial. If, as was stated by the court in *Odell v. Hudspeth, supra,* the trial was a farce, then there is no question that the trial would have been unfair. But no such allegation has been made nor did the district court so find. The court rather implied that had the trial court held a recorded hearing and made the same determination it would have

been proper to have ordered shackles. Further the district court found to its satisfaction that there were no circumstances in this case justifying the use of shackles and that this alone resulted in the denial of a fair and impartial trial. The court then resolved:

> "The import of the findings of fact in view of relevant legal precedent and the standards of due process of law is that concept as embodied in the Constitution of the United States requires this Court to conclude that the shackling of the petitioner during the course of his trial before a jury was a violation of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution." (A. 54).

Again it is stressed that the right to stand trial free of shackles is not guaranteed by the Constitution and only rises to constitutional proportion through the due process clause of the Fourteenth Amendment.

The import of the decision of the district court seems to be that unless the trial court, after a recorded hearing has made a finding of fact that supports a determination that a defendant must remain shackled during trial, the trial *per se* is rendered unfair. There is no known authority to support such a rule.

Certainly there was no showing that the shackling in this case in any way affected the outcome of the trial, and petitioner believes that the record supports its position that no other verdict could have been arrived at. Therefore, if it properly could be found that the trial court did commit error, that this error was not a constitutional one *per se*, and further that petitioner has demonstrated beyond a reasonable doubt that the error did not contribute to respondent's conviction.[16] The appellate court did not consider the question of harmless error.

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16. *Chapman v. California*, 386 U. S. 18 (1966).

CONCLUSION

In summary, petitioner submits that the United States District Court, affirmed by the court below, based its decisions on the faulty premise that the shackling of a defendant *per se* constitutes an unfair trial. The court indicated no other fact or circumstance which, taken together with the shackling, rendered the trial a farce and mockery of justice.

In order for the district court to find that the trial judge did not exercise proper discretion, it chose to ignore the deposition of the trial court and supporting testimony of an assistant prosecutor and one of the defense counsel that the matter of shackling had been considered at pre-trial hearings, and that the trial court had made a prior determination that shackling was necessary to preserve the security of the court unless the sheriff was prepared to assure the court that it was not necessary.

Moreover the district court then substituted its judgment for that of the trial court and found no grounds for shackling even though to do so it was necessary to believe a self-serving story related by respondent at the hearing in district court in February 1969 when it was refuted completely by his testimony at the trial which occurred in 1963. As the district court stated:

> "Perhaps some of the true facts are lost in the faded memories of the participants, a happenstance which only points out more clearly the need for the trial judge to make a record of the circumstances surrounding the shackling of the petitioner. However, without this record, and in view of the evidence adduced by the petitioner at the evidentiary hearing held in this Court, there can only be the assumption that the trial court erred in allowing the shackling to so occur."

Federal habeas corpus is not bottomed upon assumptions that state trial courts err. The burden still is on the

habeas corpus petitioner to prove, by a preponderance of the evidence, that his was an unconstitutional trial. He cannot do this by concocting a story that is rendered highly suspect by an entirely different story, related under oath, at his trial. Yet this story was the only basis for the district court's finding that respondent had shown to its satisfaction that there were no circumstances present which would have justified the use of the extreme security method of shackling.

Where is the greater abuse of discretion? The trial court's, whose discretion is supported by the record, or the district court's, which ignores the testimony of court officials and a trial judge, whose character has not been assailed, in favor of a self-serving story of a convicted felon who, some six years later, tells it for the first time.

Respectfully submitted,

PAUL W. BROWN
Attorney General

LEO J. CONWAY
Assistant Attorney General
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the respondent, John Elmer Woodards, via the United States mail, through the office of his attorney, Nikki Schwartz, of Berkman, Gordon & Kancelbaum, Attorneys-at-law, 815 Superior Building, Cleveland, Ohio 44114, this _____ day of _____ 1970.

LEO J. CONWAY,
Attorney for Petitioner.

APPENDIX

Page

A. Opinion of The United States District Court For the Southern District of Ohio, Eastern Division 30

B. Opinion of The United States Court of Appeals for The Sixth Circuit, affirming the District Court 47

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 8045

JOHN ELMER WOODARDS,

Petitioner

vs.

E. L. MAXWELL, Warden,
Ohio Penitentiary,

Respondent

OPINION AND ORDER

[Filed September 10, 1969]

This is an action brought by the petitioner, a state prisoner, for a writ of habeas corpus under the provisions of 28 U.S.C.A. §2241 et seq. The constitutional errors asserted by the petitioner in his Supplemental Amended Petition are essentially as follows:

1. Petitioner was denied a fair trial in violation of the due process clause of the Fourteenth Amendment of the United States Constitution by being compelled to appear before the jury trying him, in a trial which lasted from January 20, 1964 to January 31, 1964, with his hands shackled and strapped to his body.

2. Petitioner was denied, (1) a fair trial in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, and, (2) the right to confront witnesses against him in violation of the Sixth Amendment of the United States Constitution as incorporated by the due process clause of the Fourteenth Amendment by the prosecutor's repeated unsworn assertions of personal knowledge of facts damaging to petitioner's defense.

3. Items seized from petitioner's home in violation of protections guaranteed by the Fourth, Fifth and Fourteenth Amendments of the United States Constitution were introduced into evidence against petitioner at his trial.

4. Oral admissions obtained from petitioner after seventy-one hours of detention and interrogation were introduced against petitioner at trial in violation of rights guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

5. In determining what evidence should be admitted and what evidence excluded on the question of petitioner's mental condition, and in instructing the jury regarding the test to be applied in determining whether petitioner was mentally responsible for having committed the offense charged, the trial court, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, precluded examination of the question of petitioner's capacity to control his behavior.

6. By sentencing petitioner to death pursuant to a jury verdict which, under Ohio law, carries a mandatory death penalty, the trial court violated rights guaranteed by the cruel and unusual punishment clause of the Eighth Amendment and by the due process clause of the Fourteenth Amendment of the United States Constitution.

7. By instructing the jury that petitioner bore the burden of proof on the issue of insanity, and that he could sustain that burden only by demonstrating, by a preponderance of the evidence, that he lacked the mental capacity to commit the offenses charged, the trial court erroneously relieved the state of the burden of establishing guilt beyond a reasonable doubt in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

8. By striking from the jury panel all veniremen who expressed conscientious objection to the imposition of the death penalty, the trial court denied petitioner the right to be tried by a fair and impartial jury in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

9. By entrusting the jury with the absolute power to determine whether petitioner should live or die if he were found guilty of the offense charged, and by offering no reasonable guidelines to the jury relevant to the exercise of discretion vested in the jury, the trial court denied petitioner a fair trial in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

Under the doctrine of *Townsend v. Sain*, 372 U.S. 293, 313, (1963) the Court held an evidentiary hearing in order to reveal material facts, especially relative to the petitioner's claim concerning his shackling at trial, which were not adequately developed at the state court proceedings.

Both parties have submitted post hearing memoranda and the Court has considered this case on the basis of these memoranda, all other pleadings filed by either party, all exhibits submitted and received in evidence at the hearing, the testimony of all witnesses, and finally, the oral arguments of counsel.

Facts:

On Saturday, July 13, 1963, Margaret Van Arsdale, a woman 85 years of age, was discovered dead in the utility room of her home in Columbia Station, Ohio (a small community just west of Cleveland, Ohio). A blanket was wrapped around her body and tied with her nightclothes and underclothes.

An autopsy showed that all her ribs had been broken, her spleen ruptured and her perineum and vaginal wall torn. She had suffered injuries to her head, left forearm, right hand and other parts of her body.

About noon that same day, two sheriff's cars were dispatched to the residence of the petitioner, John Woodards, a former tenant of the victim. No one was at home. A deputy entered the house and took a pair of work boots which he placed in his car. Shortly thereafter, Woodards arrived and was arrested by the officers. He was informed that he was wanted for questioning in connection with a gas station robbery which had occurred the night before.

One of the deputies accompanied Woodards into his house where the petitioner identified and gave to the deputy the clothes which he said he had been wearing the night before. He was then taken to county jail. The deputy later returned for more clothing which the petitioner's wife gave him.

Woodards was questioned briefly, was fingerprinted on July 13 and was held in jail. On Monday, July 15, at about 1:15 P.M., he was questioned for the first time concerning the murder of Mrs. Van Arsdale. At that time, he was informed by a deputy sheriff that he was not required to make any statement and was advised by an assistant prosecutor of his federal and state constitutional rights, including the fact that any statement he might make could be used against him.

The deputy in charge of the investigation read to Woodards from a book on the subject of sexual deviations of older women and asked him whether he did not want to relieve the load on his shoulders. Woodards then made a statement which the court reporter transcribed. He agreed to go to the Van Arsdale residence and reenact the incident. During the drive to and from the scene, he

was questioned, and the questions and answers were taken down in shorthand by a deputy sheriff. Upon their return to the jail, Woodards was taken before a magistrate at the Elyria Municipal Court and charged with first degree murder. On July 16, he was represented by counsel, waived preliminary hearing and was bound over to the Grand Jury.[1]

The petitioner was indicted for first degree murder on July 23, 1963 and at the arraignment on July 26, while represented by counsel, Woodards pleaded not guilty.

In the trial before a jury, Woodards testified in his own behalf as to the events which took place on the night of July 12, 1963.[2]

The jury convicted the petitioner of murder in the first degree, without a recommendation of mercy, and the mandatory death sentence was imposed. After appellate affirmance of this conviction in the Ohio courts (see *State* v. *Woodards*, 6 Ohio St. 2d 14 (1966)), this action for a writ of habeas corpus was filed and the petitioner was granted an indefinite stay of execution of his death sentence by this Court on December 23, 1966 pending the outcome on the merits of this action.

The Court first focuses its attention on the contention of the petitioner which relates to the striking from the jury panel all veniremen who expressed conscientious objection to the imposition of the death sentence. The resolution of this issue hinges directly on the applicability of a recent case decided by the Supreme Court of the United States, *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

In *Witherspoon*, the Court attempted to be as clear as possible in stating the holding of the case.

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1. This summary of facts was taken substantially from the opinion in *State* v. *Woodards*, 6 Ohio St. 2d 14 (1966).
2. There are some variations from the facts as previously stated and the petitioner's testimony at trial. Insofar as relevant to the issues raised in this proceeding, these variations will be discussed and resolved in the body of this Opinion.

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. *Witherspoon, supra,* 391 U.S. at 521-23.

Among the exhibits admitted by the Court during the course of the evidentiary hearing was Joint Exhibit 1-D, which is the transcript of the voir dire examination of the jurors held prior to the petitioner's murder trial. This examination took place on January 20, 1964, and contains the questions and answers of some twenty-seven members of the jury panel. Of these twenty-seven persons, twenty-four of them were examined to determine their qualifications to sit as regular jurors, while the remaining three were examined in relation to their qualifications as alternate jurors. Because none of the alternate jurors participated in the deliberations or verdict at the conclusion of petitioner's trial, the Court will not consider their examination relevant in the discussion of the *Witherspoon* issue.

As has been stated, there were twenty-four members of the jury panel questioned with respect to their qualifications as regular jurors. Of this number, twelve were excused, five preemptorily by the defendant-petitioner, and seven by the trial judge. The circumstances under which these seven members of the jury panel were excused by the trial judge constitute the present area of judicial inquiry.

Joint Exhibit 1-D reveals the following discussion with a prospective juror concerning the imposition of capital punishment:

> Q. [by the Court] Let me ask you this broad question: Do you know of any reason why you could not sit here and listen to the evidence and render a fair and impartial verdict?

A. [by Gilbert A. Fairchild, a veniremanl I guess it's proper to mention this that I — by hearsay I understand that in a first degree murder case a person who does not approve or believe in capital punishment should not sit on a jury, is that correct?
Q. That's a correct statement?
A. That is the case.
Q. In other words, you have a belief and you are convinced that in your own conscience you do not believe in capital punishment?
A. That is correct.
Q. Is that because of a religious —
A. No.
Q. — basis?
A. No.
Q. Have you had that conviction for any length of time?
A. Oh, I'd say five years.

> The Court: Mr. Mikus [the prosecutor], do you care to inquire?
> Mr. Mikus: We do not care to inquire.
> The Court: Well, I believe I will just excuse you, Mr. Fairchild.
>
> The Court respects your convictions and your stand on this and, for that reason, you would be disqualified and the Court will excuse you. (Jt. Ex. 1-D, pp. 324-325).

Joint Exhibit 1-D further reveals this colloquy with respect to a second prospective juror:

Q. [by the Court] Well, let me put it to you another way. Maybe we can get an expression from you this way.
Would it embarrass you to vote the death penalty in a proper case if you were selected in this case?
A. [by Robert A. Cobbs, a veniremanl I believe it would a little bit.

Q. Now, the next question: Even though you were, if you were embarrassed to vote the death penalty, would you, in a proper case, vote a death penalty?

A. Yes, I suppose I would.

The Court: Well, I believe in view of his answers, which are not too clear, really, and since this is a serious matter, Mr. Cobbs, you understand that if you have any reservations about capital punishment, then, perhaps, you should not sit on this jury.

Do you have some reservations about capital punishment?

Mr. Cobbs: Well, there must be because —

The Court: Well, I think, under those circumstances, this prospective juror should be excused at this point.

You may be excused. (Jt. Ex. 1-D, pg. 276).

The preceding excerpts from the voir dire examination of the jurors at the petitioner's trial bring the *Witherspoon* issue squarely into focus. This Court finds that the standards set by the Supreme Court of the United States in the *Witherspoon* case were violated by the manner in which veniremen were excused from jury service in the petitioner's trial.

> The most than can be demanded of a venireman in this regard [i.e., his scruples against infliction of capital punishment] is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded

> on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.
>
> We repeat, however, that nothing we say today bears upon the power of a state to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear, (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or, (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt. Witherspoon, supra,* 391 U.S. at 522-523 n 21.

It is clear to this Court that the expression of scruples against the imposition of capital punishment made by venireman Fairchild in no way indicates that he would automatically vote against its imposition without regard to the evidence adduced at trial or that his scruples would prevent him from making an impartial decision as to the defendant's guilt. Further, with respect to the questioning of venireman Cobbs, the record clearly reveals that, after some admittedly ambiguous statements concerning his beliefs as to capital punishment, Cobbs would have voted for the death penalty in the proper case. Both of these veniremen were excluded from the defendant's jury for their beliefs with respect to capital punishment on a basis broader than is permissible under the Sixth Amendment to the Constitution of the United States as interpreted in *Witherspoon.*

There are cases decided subsequent to *Witherspoon* which have held the principles announced in that case to be inapplicable either because the veniremen had indicated that they would *automatically* vote against the im-

position of capital punishment (see *Segura* v. *Patterson*, 402 F. 2d 249, 252 (10th Cir. 1968)) or because there was no systematic exclusion of scrupled jurors, but in fact acceptance of some jurors even though they envinced conscientious scruples (see *Bell* v. *Patterson*, 402 F. 2d 394, 397-9 (10th Cir. 1968)). The Court considers each of these cases to be inapplicable to the instant situation.

The Court determines, on the basis of the foregoing discussion, that the petitioner's right to a fair and impartial jury, as secured by the due process clause of the Fourteenth Amendment of the United States Constitution, was violated by the imposition of the death penalty by this jury.

The second alleged constitutional error which the Court will discuss on the merits is the contention of petitioner that his rights under the due process clause of the Fourteenth Amendment to the United States Constitution were violated because he was compelled to appear before the jury trying him with his hands shackled and strapped to his body.

The evidence received by this Court at the evidentiary hearing was in great part directed specifically to the circumstances surrounding this shackling. The Court notes that there is no dispute that the petitioner was, in fact, shackled during the whole course of his trial. Further, the testimony clearly shows and the Court so finds that the jurors were aware, at some point in the trial, that shackles were on the petitioner.

The Court has been able to discover only four Ohio appellate court decisions which discuss in any depth the issue of restraints on an accused at trial.

In *Pierpont* v. *State*, 49 Ohio App. 77, 195 N.E. 264 (1934), a case which involved a jail break from the

county jail located in Lima, Ohio, by the notorious John Dillinger, the defendant made the contention that it was prejudicial for the trial court to permit him to be handcuffed and shackled with leg irons during the trial. The appellate court, in holding that the restraints placed on the defendant were within the discretion of the trial judge and that there was no abuse of that discretion shown, emphasized the unusual circumstances and the constant threat of a jail break. In a related case decided the same year, a similar ruling was made. *Makley* v. *State*, 49 Ohio App. 359, 197 N.E. 339 (1934).

A third decision from an Ohio appellate court is *State* v. *Bryan*, 69 Ohio App. 306, 43 N.E. 2d 625 (1942). There the Court, citing both the *Pierpont* and *Makley* decisions, held that there was no abuse of discretion by the trial judge in allowing the defendant to appear before the jury in shackles. The Court also noted that the sheriff testified that he felt the restraints on the defendant were necessary. However, as pointed out in *State* v. *Farmer*, 90 Ohio App. 49, 53, 103 N.E. 2d 289 (1951), the reliance by the trial judge on the opinion of the sheriff is not an exercise of discretion, but an abdication of it and it is erroneous for the trial judge to rely solely on the sheriff's opinion. Further support for this proposition can be found in other jurisdictions. See *State* v. *Roberts*, 206 A. 2d 200 (Sup. Ct. N.J. 1965).

There is direct contradiction of testimony in the record of this case concerning the circumstances under which Judge Pincura, the trial judge, made the decision to hold the petitioner in shackles at trial. Both Judge Pincura and Mr. Otero, a member of the Lorain County Prosecutor's staff, testified that there was a discussion before trial with both the petitioner and his counsel present, concerning whether the petitioner would be

shackled at trial. Judge Pincura further testified in his deposition (Joint Ex. #3) that Woodards' counsel conceded that there was an attempted jail break by the petitioner. (Joint Ex. #3, 11-12) Neither this concession by trial counsel nor, in fact, any discussions between Judge Pincura and the petitioner or his counsel concerning the issue of shackling has been preserved by record, with the exception of the following colloquy.

Judge Pincura and Mr. Adams, petitioner's counsel, discussed the matter of shackling at the very start of the trial in this manner:

Mr. Adams: May his handcuffs be removed, Your Honor?

The Court: It will be up to the Sheriff.

Mr. Adams: If the Court please, may the record, at this time, show that I object to the defendant's being shackled in the courtroom.

The Court: The Court's ruling on the request to unshackle the defendant is that it is a question of security. It all depends on what the Sheriff's wishes are in the matter.

Has the Sheriff decided what —

A Deputy: We wish for the prisoner to remain shackled, Your Honor.

Mr. Adams: Well, at least can the belt be removed if the handcuffs remain on?

The Court: As I say, it is a question of security. It is up to the Sheriff.

Mr. Adams: Do you object to that?

A Deputy: We do request the same security we have on him at this time, Your Honor.

The Court: Very well, so ordered.

Mr. Adams: If the Court please, he is going to remain here for days. You can't expect him to remain in that position.

The Court: The Court has made a ruling. You may have your exception for the record, Mr. Adams. (Tr. Record, 6A-6B).

As facts with respect to the circumstances surrounding the shackling of the petitioner at his trial the Court finds that, (1) the petitioner, John Elmer Woodards, was never directly confronted with the allegation that he had attempted a jail break, (2) neither the petitioner nor his counsel ever admitted that the statements relating to the attempted jail break were true, (3) except for the one incident regarding certain tools that were found in the petitioner's prison cell and which were alleged to have been used for an attempted jail break, the conduct of the prisoner at all times prior to trial (including two trips to Lima State Hospital and one to Cleveland, Ohio for psychiatric examination) and also during the course of the trial gave no reason for the use of shackles during the course of the trial, (4) the tools found in the petitioner's cell were used to make what have been admitted as Petitioner's Exhibits 1, 2A, 2B, 2C and 2D and the use of these tools for any other purpose is unsupported by any credible evidence in the record, (5) the decision made by Judge Pincura regarding the issue of whether the petitioner was to be shackled at trial was not made in the exercise of his own discretion, but rather, as the clear import of the discussion between Judge Pincura and Mr. Adams at the initial stage of the trial reveals, was an abdication of that discretion to the opinion of the sheriff, and, (6) Judge Pincura, by his own admission, never considered reasonable alternative methods of providing for the security of the courtroom.

The Court feels that the New Jersey court in *State* v. *Roberts*, 206 A. 2d 200, 205 (Sup. Ct. N.J. 1965) was correct in its statement that "[h]is (the defendant) being

restrained must carry obvious implications even to the most fair minded of juries." In its appraisal of what procedures needed to be followed in order to obviate these implications in all but the most extreme cases, the Court went on to say:

> The power to order a defendant to stand jury trial while handcuffed or shackled calls for a meaningful exercise of judicial discretion. The information upon which the judge acts need not necessarily come from evidence formally offered and admitted at the trial. . . . However, such information or knowledge should be spread on the record before trial, and out of the presence of the jury, and defendant should be afforded reasonable opportunity to meet that information. . . .
>
> The entire matter should be aired by a hearing, however informal, but on the record, at the time the custodial authorities propose to bring the accused into court, so as to enable the judge to make his decision out of the presence of the jury panel. *Roberts, supra,* 206 A. 2d at 204-5.

The need for such a hearing in the instant case is most obvious. The petitioner has presented to this Court ample evidence upon which this Court has based its belief that the alleged contraband that was found in the petitioner's cell prior to trial was not being used to break jail but was, in fact, being used to construct perfectly innocent items of handicraft for his wife.

Perhaps some of the true facts are lost in the faded memories of the participants, a happenstance which only points out more clearly the need for the trial judge to make a record of the circumstances surrounding the shackling of the petitioner. However, without this record, and in view of the evidence adduced by the petitioner at the evidentiary hearing held in this Court, there

can only be the assumption that the trial court erred in allowing the shackling to so occur.

The case of *State* v. *Roberts, supra,* points out a further infirmity in the trial of this petitioner. The reply of the judge to the request of defense counsel to unshackle his client was "[I]t will be up to the sheriff." As far as the record in this case shows, the discretion of the judge that the respondent has relied upon was never exercised, but rather was abdicated in favor of the opinion of the custodial authorities. Whatever explanation Judge Pincura may have at this time concerning his decision to allow the shackling of this petitioner, it is insufficient to rebut his unequivocal statements made to defense counsel at the opening of the trial and the proof offered by the petitioner.

> Freedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial. [citing authority] Ordinarily such procedure should be permitted only to prevent the escape of the prisoner or to prevent him from injuring bystanders and officers of the court or to maintain a quiet and peaceable trial. *Odell* v. *Hudspeth,* 189 F. 2d 300, 302 (10th Cir. 1951).

The petitioner has shown to the satisfaction of this Court that there were no circumstances present in the instant case which would have justified the use of the extreme security method of shackling. There was no "at trial" conduct that indicated in any manner that the petitioner would attempt violence of any sort, and indeed even the pretrial conduct relied upon by the respondent has been shown to be something less than the attempted jail break it was alleged to be. See *Dennis* v. *Dees,* 278 F. Supp. 354 (E.D. La. 1968).

Finally, the state trial judge, by his own admission, failed to explore reasonable alternative methods of security. In light of the evidence produced at the evidentiary hearing in this court, the exploration of these alternatives may have prevented the prejudice resulting to the petitioner. See *Dennis, supra,* 278 F. Supp. at 357-8.

The inescapable conclusion to be reached in this case is that the defendant could not, under the circumstances of the "security measures" in this case, have been given a fair and impartial trial as required by the Constitution and the laws of the United States of America.

The import of the findings of fact in view of relevant legal precedent and the standards of due process of law is that concept as embodied in the Constitution of the United States requires this Court to conclude that the shackling of the petitioner during the course of his trial before a jury was a violation of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

The Court has resolved the alleged constitutional errors numbered herein as No. 1 (shackling defendant at trial) and No. 8 (exclusion from the jury of persons expressing conscientious objections to capital punishment) in favor of petitioner, and thus the writ will be granted on these grounds.

With respect to the remaining alleged constitutional errors as described herein, the Court decides as follows:

(a) The Court considers that its resolution of error No. 8 renders unnecessary any resolution of error No. 6 (death penalty — cruel and unusual punishment) and error No. 9 (absolute power of jury to impose death penalty).

(b) The Court considers that it is unnecessary to resolve the alleged constitutional errors No. 3 (illegal

seizure of evidence) and No. 4 (admission of illegally seized evidence) because if these admissions were constitutional errors at the trial, all constitutional grounds for exclusion of such evidence will be available to defendant at retrial.

(c) The Court considers that if the alleged constitutional error No. 7 (burden of proof re insanity of defendant) and No. 8 (admission or exclusion of defendant's mental condition and jury instruction thereon) were constitutional errors at trial, the trial judge and prosecutor at retrial will be advised in this area and will act accordingly.

Accordingly, the Court makes no decision on the merits of alleged constitutional errors Nos. 2, 3, 4, 5, 6, 7 and 9.

WHEREUPON, the Court determines that the petitioner's application for a writ of habeas corpus is meritorious and therefore the relief requested in the writ is hereby GRANTED.

ACCORDINGLY, IT IS ORDERED that the petitioner be and he is hereby remanded to the Common Pleas Court of Lorain County, Ohio for such further proceedings as may be deemed necessary and proper in accordance with law.

IT IS FURTHER ORDERED that if no action be taken by the State of Ohio or the County of Lorain within 120 days after the filing of this Order, petitioner's release shall be final and unconditional.

JOSEPH P. KINNEARY,
United States District Judge.

No. 16512

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

JOHN ELMER WOODARDS,
Petitioner-Appellee,
v.
H. J. CARDWELL, Warden,
Ohio Penitentiary,
Respondent-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio Eastern Division.

Decided and Filed August 17, 1970.

Before: WEICK, CELEBREZZE and BROOKS, Circuit Judges.

BROOKS, Circuit Judge. This is an appeal by the respondent-appellant, H. J. Cardwell, Warden, Ohio Penitentiary, who has custody of John Elmer Woodards, petitioner-appellee, a convicted murderer, who, following an evidentiary hearing in the District Court, has been granted a writ of habeas corpus.

In 1963 petitioner was convicted of first degree murder of a woman 83 years of age. The jury verdict was without a recommendation of mercy and under Ohio law, Ohio Revised Code §2901.01, a mandatory death penalty was imposed. The conviction was affirmed, *State* v. *Woodards*, 6 Ohio St. 2d 14 (1966), cert. denied, 385 U.S. 930 (1966).

At the trial two prospective jurors were excused for cause when they expressed some objection to the im-

position of the death penalty.' This was error. The rule is clearly set forth in Witherspoon v. *Illinois*, 391 U.S. 510, 521-523 (1968) as follows:

> "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections

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1. Gilbert A. Fairchild, veniremen.
"Q. (by the Court) Let me ask you this broad question: Do you know of any reason why you could not sit here and listen to the evidence and render a fair and impartial verdict?
"A. (by Fairchild) I guess it's proper to mention this that I — by hearsay I understand that in a first degree murder case a person who does not approve or believe in capital punishment should not sit on a jury, is that correct?
"Q. That's a correct statement?
"A. That is the case.
"Q. In other words, you have a belief and you are convinced that in your own conscience you do not believe in capital punishment?
"A. That is correct.
"Q. Is that because of a religious —
"A. No.
"Q. — basis?
"A. No.
"Q. Have you had that conviction for any length of time?
"A. Oh, I'd say five years.
The Court: "Mr. Mikus (the prosecutor), do you care to inquire?
Mr. Mikus: "We do not care to inquire.
The Court: "Well, I believe I will just excuse you, Mr. Fairchild. The Court respects your convictions and your stand on this and, for that reason, you would be disqualified and the Court will excuse you.
• • •
Robert A. Cobbs, veniremen.
"Q. (by the Court) Well, let me put it to you another way. Maybe we can get an expression from you this way.
"Would it embarrass you to vote the death penalty in a proper case if you were selected in this case?
"A. (by Cobbs) I believe it would a little bit.
"Q. Now, the next question: Even though you were, if you were embarrassed to vote the death penalty, would you, in a proper case, vote a death penalty?
"A. Yes, I suppose I would.
The Court: "Well, I believe in view of his answers, which are not too clear, really, and since this is a serious matter, Mr. Cobbs, you understand that if you have any reservations about capital punishment, then, perhaps, you should not sit on this jury.
"Do you have some reservations about capital punishment?
Mr. Cobbs: "Well, there must be because —
The Court: "Well, I think under those circumstances, this prospective juror should be excused at this point.
"You may be excused.

to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Footnotes omitted).

The District Court correctly interpreted the rule in holding that the death sentence imposed by the improperly selected trial jury could not be executed. Witherspoon, however, does not invalidate the guilty verdict. It holds only that the death sentence imposed by an improperly selected jury cannot be executed. *Witherspoon v. Illinois*, supra, p. 523, n. 21. The respondent argues that we cannot reach the Witherspoon issue raised by the petitioner as the petitioner has not exhausted state remedies as required by Title 28 U.S.C. §2254 (b) (c). Petitioner did appeal his conviction to the Ohio Supreme Court but the Witherspoon issue was not raised. *State v. Woodards*, supra. However, it is provided by Title 28 U.S.C. §2254 (b) that state remedies need not be exhausted where "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." This Court has on several occasions considered this point with regard to Ohio appellate procedures. See, *Allen v. Perini*, — F. 2d — (6th Cir. 1970); *Coley v. Alvis*, 381 F. 2d 870 (6th Cir. 1967). In light of the Ohio Supreme Court's decision in *State v. Duling*, 21 Ohio St. 2d 13 (1970), we hold it would be futile for petitioner Woodards to have proceeded through the State appellate process again.

The other crucial contention advanced by the petitioner is that it was error of constitutional proportions for the trial judge to compel him to be handcuffed and shackled throughout his trial. The District Court, following a full evidentiary hearing, held that the shackling

was a violation of petitioner's constitutional rights under the due process clause of the Fourteenth Amendment and concluded that he was denied a fair trial. We agree.

It is undisputed that petitioner was shackled, by handcuffs around his wrists attached to a restraining belt around his waist, from the beginning to the end of his nine day trial. Only on one occasion when petitioner took the stand was one of the handcuffs removed. It also is not disputed that, while some effort was made to keep the jurors from constant awareness of the manner in which petitioner was shackled, they could not avoid observing his wearing of the restraints.

At the beginning of the trial defense counsel requested that the shackles be removed and the following colloquy occurred:

> [Counsel:] "May his handcuffs be removed, Your Honor?
>
> "The Court: It will be up to the Sheriff.
>
> [Counsel:] "If the Court please, may the record, at this time, show that I object to the defendant's being shackled in the courtroom.
>
> "The Court: The Court's ruling on the request to unshackle the defendant is that it is a question of security. It all depends on what the Sheriff's wishes are in the matter. Has the Sheriff decided what —
>
> "A Deputy: We wish for the prisoner to remain shackled, Your Honor.
>
> [Counsel:] "Well, at least can the belt be removed if the handcuffs remain on?
>
> "The Court: As I say, it is a question of security. It is up to the Sheriff.
>
> [Counsel:] "Do you object to that?
>
> "A Deputy: We do request the same security we have on him at this time, Your Honor.
>
> "The Court: Very well, so ordered.
>
> [Counsel:] "If the Court please, he is going to re-

main here for days. You can't expect him to remain in that position.

"The Court: The Court has made a ruling. You may have your exception for the record, Mr. Adams."

This brief exchange on the shackling of petitioner is the only discussion of this important issue preserved by the record of the trial court. Based on this sparse record, the Supreme Court of Ohio stated that a prisoner may be shackled when such precaution is shown to be necessary to prevent violence or escape, and held that under the circumstances of this case, the trial court had not committed error by abusing its discretion when it required the shackling of petitioner, citing *Tunget* v. *Commonwealth*, 303 Ky. 834, 198 S.W. 2d 785, (1946) cert. denied, 331 U.S. 833; *State* v. *Courcelle*, 255 Minn. 384, 97 N.W. 2d 472, 476 (1959).

It is the accepted rule in federal habeas corpus proceedings that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. *Fiske* v. *Kansas*, 274 U.S. 380, 385 (1926); *Blackburn* v. *Alabama*, 361 U.S. 199, 208-209 (1959). And that where the material facts were not adequately developed at the state level, a federal court must grant an evidentiary hearing to a habeas corpus applicant. *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963). The District Court properly held a full evidentiary hearing in this case.

At the hearing it was developed that petitioner was in custody for more than six months prior to trial. During this time he was in the Lorain County jail and Lima State Hospital. While in the hospital for a period of at least 60 days, he lived in a dormitory with other prisoners. He was taken to Cleveland, Ohio on one occasion to undergo psychiatric examination and was alone with the doctor in the doctor's second floor office. At no time

while petitioner was in custody did he engage in any act of violence or in any other conduct that would suggest he was uncontrollable.

For the purposes of the evidentiary hearing, the deposition of the state trial judge was taken and introduced. One of his reasons, as he recalled some five years after the trial, for keeping petitioner in shackles was the report of a deputy sheriff that certain small miscellaneous items, a blank key, a piece of metal, a needle and thread, a pencil, and a T-shirt were found in petitioner's cell and could have been employed for an escape attempt. After hearing the evidence on this issue, however, the District Court found as a fact that the objects were not being used to attempt an escape, but were being used to construct perfectly innocent items of handicraft for petitioner's wife. It was also found as a fact that petitioner's conduct at all times prior to trial, including the two trips to Lima State Hospital and the one trip to Cleveland for psychiatric examination, and his conduct during the trial, provided no justification for the use of shackles during trial. It was further found as a fact that the state trial judge did not exercise his judicial discretion but rather deferred to the wishes of the sheriff who, at the commencement of the trial, requested that the restraints be retained. And the trial judge, by his own admission, never considered reasonable alternative methods to the shackling of petitioner in order to provide for the security of the courtroom.

All authorities agree that it is prejudicial for a defendant on trial to be shackled in the courtroom. *Loux* v. *United States*, 389 F. 2d 911 (9th Cir. 1968). The rule that a prisoner brought into court for trial is entitled to appear free from all bonds or shackles is an important component of a fair and impartial trial. And shackles should never be permitted except to prevent the escape of the accused, to protect everyone in the courtroom,

and to maintain order during the trial. *Illinois* v. *Allen*, 397 U.S. 337 (1970); *Way* v. *United States*, 285 F. 2d 253 (10th Cir. 1960); *Odell* v. *Hudspeth*, 189 F. 2d 300 (10th Cir. 1951), cert. denied, 342 U.S. 873.

It is also well established that the use of handcuffs and shackles is ordinarily left to the sound discretion of the trial court. *Loux* v. *United States*, supra; *Gafford* v. *United States*, 310 F. 2d 753 (10th Cir. 1962); *DeWolf* v. *Waters*, 205 F. 2d 234 (10th Cir. 1953), cert. denied, 346 U.S. 837; *Gregory* v. *United States*, 365 F. 2d 203 (8th Cir. 1966), cert. denied, 385 U.S. 1029. And sound discretion has long meant a discretion that is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. *Langnes* v. *Green*, 282 U.S. 531, 534 (1931). And this requires a knowledge and understanding of the material circumstances surrounding the matter calling for the exercise of sound discretion.

Applying these rules to the findings of fact made by the District Court, it must be concluded the District Court correctly held that it was an abuse of judicial discretion to compel the petitioner to be shackled during his trial. As noted by the District Court, it is regrettable that more facts surrounding the decision to keep petitioner shackled during trial were not preserved in the record of the trial court. It is the better practice to hold a hearing when such an issue is presented and have the facts made a part of the record. *Loux* v. *United States*, supra. It is understandably difficult for witnesses to recall circumstances that are necessary for a decision when a collateral attack is made on a judgment of conviction rendered many years ago.

The District Court, in its order granting a conditional writ of habeas corpus, considered 120 days as a reasonable period of time for the State of Ohio to take further

action, if it should so desire, before petitioner's release would become final. We affirm the order of the District Court and the 120 days shall run from the issuance of the mandate.

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